

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of	)	
<b>CONSUMERS POWER COMPANY</b> for	)	
approval of a power supply cost recovery plan	)	Case No. U-11180
and for authorization of monthly power supply	)	
cost recovery factors for calendar year 1997.	)	
<hr style="width:30%; margin-left:0;"/>	)	

At the April 24, 1997 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman  
Hon. John C. Shea, Commissioner  
Hon. David A. Svanda, Commissioner

**ORDER GRANTING LEAVE TO APPEAL  
BUT DENYING THE RELIEF REQUESTED**

On September 30, 1996, Consumers Energy Company<sup>1</sup> (Consumers) filed an application, with supporting testimony and exhibits, for approval of its 1997 power supply cost recovery (PSCR) plan and factors pursuant to 1982 PA 304 (Act 304), MCL 460.6h et seq.; MSA 22.13(6h) et seq.

On February 10, 1997, and in response to a motion filed by Consumers, Administrative Law Judge Frank V. Strother (ALJ) struck the testimony and exhibits submitted by three witnesses offered by the Association of Businesses Advocating Tariff Equity (ABATE). These witnesses' prefiled testimony and exhibits asserted that the Commission should disallow, for purposes of this Act 304 proceeding, all costs arising from Consumers' purchase of 1,240 megawatts (MW) of capacity and associated energy from the Midland Cogeneration Venture Limited Partnership (MCV) in excess of alleged market prices.

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<sup>1</sup>Effective March 11, 1997, Consumers Power Company became Consumers Energy Company.

The ALJ's decision to strike this testimony was based on the following two factors. First, he concluded that prior Commission orders<sup>2</sup> resolved this issue "once and for all" and that ABATE's proposed evidentiary presentation therefore constituted an improper collateral attack on the Commission's earlier conclusions regarding the reasonableness of Consumers' MCV cost recovery. 6 Tr. 453. Second, he noted that relitigating this issue (regarding whether Consumers' purchase of the MCV power is reasonable and prudent, and therefore should be recoverable under Act 304) in each of the utility's PSCR plan cases would serve only to delay the issuance of a final Commission order in each proceeding. This would conflict with the intent of Act 304, the ALJ concluded, which is to establish a reasonably accurate factor for application during (rather than after the close of) a particular plan year.

On February 24, 1997, ABATE filed an application for leave to appeal the ALJ's ruling. On March 10, 1997, Consumers filed a response.

ABATE contends that the stricken testimony, which compares Consumers' MCV-related costs to those that would arise from either obtaining power from a hypothetical gas-fired combined cycle generating plant or from the wholesale power market, must be allowed into evidence. This contention is based on the following two arguments.

First, ABATE argues that the language of Act 304 "requires the Commission to evaluate each year the reasonableness and prudence of all of the decisions underlying Consumers' PSCR plan" and to consider all

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<sup>2</sup>The only order specifically cited by the ALJ was the Commission's November 14, 1996 order in Cases Nos. U-10685, U-10754, and U-10787, which granted Act 304 approval to 325 of the 1,240 MW of capacity under contract between Consumers and the MCV. In contrast, ABATE's proposed testimony in the present case addressed all of Consumers' MCV capacity, including 915 MW approved by the Commission's March 31 and May 26, 1993 orders in Cases Nos. U-8871 and U-10127. Nevertheless, ABATE assumed that "the ALJ intended to apply the purported grounds for his ruling to the entire 1,240 MW block of MCV contract capacity, not just the 325 MW." ABATE's application for leave to appeal, p. 4, n. 4. That assumption is supported by the ALJ's statements that the issue of MCV capacity "has been the subject of numerous cases" and that he "can't count the number of times" that the issue has been addressed by the Commission. 6 Tr. 453.

pertinent evidence regarding those decisions, “including Consumers’ planned MCV purchases.” ABATE’s application for leave to appeal, p. 13. According to ABATE, this means that in each PSCR proceeding, Consumers must establish by a preponderance of the evidence that its purchase of MCV capacity and energy minimizes costs to ratepayers in light of all available alternatives. ABATE goes on to note that in enacting 1987 PA 81 (Act 81), the legislature carved out a narrow exception to the comprehensive review process mandated under Act 304. Specifically, it barred the Commission from disallowing capacity charges for a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA) for 17½ years from the date of the QF’s commercial operation. ABATE then points out that in Cases Nos. U-8871 and U-10127, as well as in Cases Nos. U-10685, U-10754, and U-10787, the Commission specifically refrained from granting Act 81 approval for Consumers’ purchase of MCV capacity. In light of this statutory framework, ABATE contends, it was clearly the Commission’s intent to subject Consumers’ decision to buy 1,240 MW of power from the MCV to Act 304 review in every annual PSCR plan case.

Second, ABATE argues that the ALJ’s decision to strike its proposed testimony constitutes a violation of due process. Specifically, ABATE claims that as a party to this PSCR plan case, it has a right to present evidence on all issues of fact including the reasonableness and prudence of Consumers’ planned purchase of power from the MCV. ABATE therefore concludes that the Commission must reverse the ALJ’s February 10, 1997 ruling and reinstate the proposed evidence offered by its three witnesses.

In response, Consumers claims that the ALJ was correct in finding that ABATE’s proposed presentation was an inappropriate attempt to relitigate prior decisions regarding treatment of the utility’s MCV contract. In support of this claim, the utility cites the Commission’s March 31 and May 26, 1993 orders in Cases Nos. U-8871 and U-10127, as well as the November 14, 1996 order in Cases Nos. U-10685, U-10754, and U-10787. In the first instance, Consumers notes, the Commission specifically granted ratemaking approval to 915 MW of MCV power “in [PSCR] and other proceedings for 1993 and subsequent years.” March 31, 1993

order, p. 91. In the second, the utility continues, the Commission ordered that recovery of costs arising from the remaining 325 MW “shall be implemented for [PSCR] purposes for 1996 and subsequent years . . . .”

November 14, 1996 order, p. 124.

Consumers goes on to argue that earlier attempts by ABATE to relitigate orders granting the recovery of its MCV-related costs have been consistently rejected by the Commission and the Court of Appeals. For example, Consumers notes that in Case No. U-10155, the utility’s 1993 PSCR plan case, the Commission ruled that:

[T]he evidentiary record and the Commission’s findings in Case No. U-10127 need not be relitigated or rendered meaningless in this case. In fact, in its March 31 and May 26, 1993 orders, the Commission made it clear that it . . . did not intend to allow the parties to use the annual PSCR proceedings to challenge its basic findings in Case No. U-10127, i.e., that the purchase of 915 MW of MCV capacity was reasonable, and that cost recovery for that purchase on the terms set forth in the March 31 and May 26, 1993 orders shall be implemented for 1993 and subsequent years.

Consumers’ response, p. 4; quoting the Commission’s March 30, 1994 order in Case No. U-10155, p. 11. The utility further points out that in upholding that order, the Court of Appeals agreed that parties should not be allowed to relitigate the issue of whether MCV-related costs are reasonable and prudent “except to establish by new evidence or by evidence of a change in circumstances that the [Commission’s] previous findings should no longer be applicable.” *Id.*, p. 5; quoting ABATE v Public Service Comm, unpublished opinion of the Court of Appeals, decided February 27, 1996 (Docket No. 174867), p. 2. According to Consumers, the fact that a witness can compare the utility’s MCV costs to “another hypothetical plant or to a few more small wholesale purchase contracts” does not make the proposed evidence sufficiently different from that which the Commission considered and rejected in its previous orders. *Id.*, p. 10.

Consumers further asserts that ABATE’s due process argument is incorrect. According to the utility, assertions identical to those offered in the stricken testimony were considered and rejected in Cases Nos. U-10685, U-10754, and U-10787. Specifically, testimony was received in that proceeding from James P.

McGaughy concerning the price Consumers would have to pay for power from a hypothetical combined-cycle gas-fired plant and from James T. Selecky regarding prices available on the wholesale power market. Notwithstanding that evidence, the Commission found the fixed price contained in Consumers' long-term contract with the MCV preferable to the hypothetical or short-term prices discussed by Mr. McGaughy and Mr. Selecky. Consumers therefore argues that because "there is no constitutional or statutory requirement that ABATE be allowed to repeatedly relitigate past Commission decisions," and because ample opportunity to present this type of evidence was provided and exercised in the earlier proceedings, ABATE's due process argument must be rejected. Id., p. 14.

Finally, Consumers claims that even if it did not address matters previously decided by the Commission, the stricken testimony would still be inadmissible. For example, it argues that much of the testimony submitted by ABATE's witnesses constitutes hearsay and consists of unqualified legal interpretations and conclusions. For all of these reasons, Consumers asserts that the Commission should deny the application for leave to appeal and, instead, affirm the ALJ's evidentiary ruling.

Rule 337 of the Commission's Rules of Practice and Procedure, 1992 AACS, R 460.17337, establishes the standards for reviewing applications for leave to appeal. Not every application merits immediate review; an appellant must establish one of the following conditions before the Commission will grant review:

1. A decision on the ruling before submission of the full case to the Commission for final decision will materially advance a timely resolution of the proceeding.
2. A decision on the ruling before submission of the full case to the Commission for final decision will prevent substantial harm to the appellant or the public-at-large.

If the Commission grants immediate review, it will reverse an administrative law judge's ruling if the Commission finds that a different result is more appropriate.

The Commission concludes that although the application for leave to appeal should be granted for the

purpose of resolving this issue, the relief requested by ABATE should be denied. The ALJ properly determined that the Commission has already approved 1,240 MW of MCV purchases for purposes of the 1997 PSCR proceeding, as well as subsequent proceedings. That determination is supported by the Commission's March 31 and May 26, 1993 orders in Cases Nos. U-8871 and U-10127 and its November 14, 1996 order in Cases Nos. U-10685, U-10754, and U-10787. Moreover, those orders, as well as several other rulings by the Commission and the Court of Appeals,<sup>3</sup> indicate that Consumers' power purchases from the MCV should not be subjected to an Act 304 review every year. Rather, there must be a change in circumstances to justify a departure from the Commission's previous findings that these purchases are reasonable and prudent. Because the ALJ correctly noted that ABATE's proposed testimony was not based on such a change and instead constituted nothing more than a collateral attack on prior Commission orders, his February 10, 1997 decision to strike that testimony was correct.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1982 PA 304, as amended, MCL 460.6h et seq.; MSA 22.13(6h) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACSR, R 460.17101 et seq.

b. ABATE's application for leave to appeal should be granted, but the relief requested should be denied.

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<sup>3</sup>These rulings include the Commission's January 29, 1991 order in Case No. U-9432, its December 19, 1991 order in Case No. U-9732, its February 27 and July 22, 1992 orders in Case No. U-9960, its March 30, 1994 order in Case No. U-10155, its August 18, 1994 order in Case No. U-10445, and its February 23, 1995 order in Case No. U-10155-R, as well as the Court's opinions in Consumers v Public Service Comm., 192 Mich App 180; 481 NW2d 1 (1991), Consumers v Public Service Comm., No 1, 196 Mich App 436; 493 NW2d 902 (1992), ABATE v Public Service Comm., 216 Mich App 8; 548 NW2d 649 (1996), and ABATE v Public Service Comm., 219 Mich App 653; \_\_\_ NW2d \_\_\_ (1996).

c. The ALJ's ruling striking the testimony and exhibits offered by three witnesses for ABATE should be affirmed.

THEREFORE, IT IS ORDERED that:

A. The application for leave to appeal filed on February 24, 1997 by the Association of Businesses Advocating Tariff Equity is granted, but the relief requested is denied.

B. The February 10, 1997 ruling by Administrative Law Judge Frank V. Strother, which struck the testimony and exhibits offered by three witnesses for the Association of Businesses Advocating Tariff Equity, is affirmed.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

( S E A L )

John G. Strand  
Chairman

By its action of April 24, 1997.

John C. Shea  
Commissioner

Dorothy Wideman  
Executive Secretary

David A. Svanda  
Commissioner

- b. ABATE's application for leave to appeal should be granted, but the relief requested should be denied.
- c. The ALJ's ruling striking the testimony and exhibits offered by three witnesses for ABATE should be affirmed.

THEREFORE, IT IS ORDERED that:

A. The application for leave to appeal filed on February 24, 1997 by the Association of Businesses Advocating Tariff Equity is granted, but the relief requested is denied.

B. The February 10, 1997 ruling by Administrative Law Judge Frank V. Strother, which struck the testimony and exhibits offered by three witnesses for the Association of Businesses Advocating Tariff Equity, is affirmed.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

April 24, 1997.

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Secretary

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Case No. U-11180

Suggested Minute:

“Adopt and issue order dated April 24, 1997 granting the application for leave to appeal filed by the Association of Businesses Advocating Tariff Equity but denying the relief requested, as set forth in the order.”